Tsang Yuk Chung v Public Prosecutor

COURT OF CRIMINAL APPEAL (SINGAPORE) — CRIMINAL APPEAL NO 14 OF 1988.
WEE CHONG JIN CJ, LAI KEW CHAI AND YONG PUNG HOW JJ
3 SEPTEMBER 1990

Criminal Law — Murder — Elements to be proved — Penal Code (Cap 224, 1985 Ed), s 300

Criminal Procedure — Cautioned statement — What governs admissibility of cautioned statement — Purpose of cautioned statement — Failure to explain — Inferences to be drawn — Whether inculpatory statement admissible as evidence of facts stated — Criminal Procedure Code (Cap 68, 1985 Ed), ss 122(5), (6), (7) & 123(1)

Criminal Procedure — Appeal — Discretion of appellate court to disturb finding of fact

The accused was convicted of murder under the third limb of s 300 of the Penal Code (see [1988] 3 MLJ 437). His cautioned statement was admitted at his trial. On appeal it was alleged that the cautioned statement should not have been admitted and that the accused should not have been convicted as it was shown that he had no intention of causing injury to the deceased.

Held, dismissing the accused's appeal:

(1) Section 122(6) of the Criminal Procedure Code (Cap 68, 1985 Ed) ('the Code') does not provide for the admissibility of statements recorded thereunder. This is found in s 122(5) of the Code, and a statement whether or not it is purported to have been made under s 122(6) is admissible so long as s 122(5) is satisfied.

(2) An inculpatory statement is evidence of the facts stated therein.

(3) A statement recorded under s 122(6) is also admissible in evidence for the purpose stated in s 123(1) of the Code. Non-compliance with s 122(6) results not in a statement being inadmissible, but in enabling the court having to take such non-compliance into consideration when deciding what inferences, if any at all, should be drawn from the failure of the accused to mention certain facts.

(4) The test is whether it could be said that the circumstances existing at the time the accused was charged were such that he could be reasonably have been expected to mention certain facts on which he was relying in his defence.

(5) The accused conceded that the statement was made voluntarily. Section 122(5) of the Code had therefore been satisfied, and in the absence of any reliance by the prosecution on s 123(1), it could not be argued that non-compliance with s 122(6) should affect the admissibility of the statement.

(6) A person cannot be found guilty of murder by the application of the third limb of s 300 of the Penal Code unless it is proved that the fatal injury found to be present was the injury intended to be inflicted. The prosecution must prove that the accused did an act which caused the death of the deceased, the said act was done with the intention of causing bodily injury and the injury caused was intended and not accidental and was sufficient to cause death.

(7) An appellant court will not disturb findings of fact unless they are clearly reached against the weight of the evidence.

(8) The requirement that the notice in s 122(6) 'shall be explained' will be satisfied if an accused person is told in general terms what the charge and warning mean. Since accused persons differ in background, what form the explanation takes must ultimately depend on the facts of each case.

Cases referred to

1 *PP* v *Chan Sway Beng* [1988] 2 MLJ 405 (distd)
2 *PP* v *Chan Kim Choi* [1989] 1 MLJ 404 (refd)
3 *Mimi Wong & Anor* v *PP* [1972] 2 MLJ 75 (folld)
4 *PP* v *Visuvanathan* [1978] 1 MLJ 159 (folld)

Legislation referred to

Criminal Procedure Code (Cap 68, 1985 Ed) ss 122(5), 122(6), 122(7), 123(1)
Penal Code (Cap 224, 1985 Ed) s 300

Michael Teo for the appellant.
Seng Kwang Boon (Deputy Public Prosecutor) for the Public Prosecutor.

Cur Adv Vult

Wee Chong Jin CJ (delivering the judgment of the court): The appellant was convicted by the High Court of the offence of murder. [See [1988] 3 MLJ 437.] We dismissed his appeal and now give our reasons.

At the hearing of the appeal counsel for the appellant advanced two grounds.

The first ground

The first ground is that the trial judges had erred in law and in fact by admitting in evidence the statement of the appellant recorded under s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Ed) ('the CPC').

Counsel for the appellant conceded that the statement was made voluntarily, and without any inducement, threat or promise. However, he argued that the provisions of s 122(6) had not been complied with by the investigating officer who recorded the statement thereunder in that the investigating officer did not explain the charge nor the prescribed warning to the appellant.

The relevant facts were as follows:

On 15 October 1985 at 6.10pm, the investigating officer, one Inspector Lee Kim Seng through a certified interpreter, one Wong Shue Hong, charged the appellant with murder. This was done by Inspector Lee reading in English a typewritten charge, which was interpreted by Mr Wong in Cantonese for the appellant, who was a Hong Kong seaman. The appellant signed the typewritten charge. According to Inspector Lee, this was to acknowledge that he understood it. Inspector Lee and Mr Wong also signed the typewritten charge.

At 6.15pm the same day, Inspector Lee wrote the charge out on a piece of paper and read it to the appellant in English. Mr Wong interpreted it in Cantonese for the appellant. The appellant, Inspector Lee and Mr Wong

signed below the handwritten charge. Inspector Lee then wrote the following words:

> The above charge which is similar to the typed (sic) written one read earlier was read and explained to the accused by the interpreter. The accused understood the charge and signed after it. The interpreter and I also signed.

Then, all three of them signed again. Inspector Lee then wrote on the paper the following warning:

> Do you wish to say anything in answer to the charge? If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you hold it back till you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this will be done.

Inspector Lee read the warning to the appellant in English. Mr Wong interpreted it in Cantonese for the appellant. The appellant, Inspector Lee and Mr Wong signed below the warning. Inspector Lee then wrote the following words:

> The above Notice of Warning was read and explained to the accused by the interpreter. Having understood it, the accused was invited to sign after it. The interpreter and I also signed it. I then served a copy of the charge and Notice of Warning to the accused.

Then, all three of them signed again. A copy of the piece of paper on which the charge and warning was written was then served on the appellant.

The appellant then made a statement through Mr Wong which was recorded in English by Inspector Lee as follows:

> I admitted that I stab (sic) him (the deceased) with the knife because on four occasions the deceased threatened to ask someone to assault me when we return (sic) to Hong Kong. On the last occasion on 15 October 1985 at about 6.30am, the deceased wanted attack me with a knife but I ran away. Later, when I saw the deceased, he (deceased) told me that he would certainly asked someone to beat me up when the ship return to Hong Kong. Some crew members heard what the deceased said. These incidents provoked me into stabbing the deceased. Therefore, on 15 October 1985 at about 11.20am, I took a fruit knife from my room and met the deceased at the pantry. On seeing the deceased, I was so angry that I stabbed him (deceased). I do not know where I stabbed him. It was the deceased who had driven me to do such thing to him. The deceased always complained to the chief steward that I did not do my work properly.

The appellant signed the statement. Inspector Lee and Mr Wong also signed. All three of them signed again after the following words which were handwritten by Inspector Lee:

> On 15 October 1985 at about 6.58pm, the accused completed his statement. It was then read back to him by the interpreter. He affirmed that it was true and correct. The accused was then invited to sign after it.
>
> 'The interpreter and I also signed likewise. I then invited the accused to make any alteration, addition or deletion to his statement, but he declined. The statement was volunteered by the accused. There was no inducement, promise or threat made to the accused by either the interpreter or myself to obtain it.'

Mr Wong died on 15 April 1987 before the case came to trial and so was not available at the trial to give evidence of what he said in Cantonese to the appellant when he interpreted the typewritten charge, the handwritten charge and the warning.

Inspector Lee testified that as regards the typewritten charge and the warning, he had asked Mr Wong to read and explain them in Cantonese to the appellant. As regards the handwritten charge, he had asked Mr Wong to find out from the appellant whether he wished to have Mr Wong read and explain it, the handwritten charge being similar to the typewritten charge read earlier. According to Inspector Lee, the appellant's reply was that there was no necessity to do so.

On these facts, counsel for the appellant argued that s 122(6) of the CPC had not been complied with, and the statement purportedly recorded thereunder had been wrongly admitted in evidence.

It was argued that Inspector Lee had not explained to the appellant the definition of murder under s 300 together with all the exceptions. It was also argued that Inspector Lee had not explained that the charge of murder would attract the death penalty. Finally, it was argued that it was the duty of the investigating officer, and not the interpreter, to explain the charge and warning to the appellant.

Section 122(6) reads:

> Where any person is charged with an offence or officially informed that he may be prosecuted for it, he shall be served with a notice in writing, *which shall be explained to him*, (emphasis added) to the following effect:
>
> 'You have been charged with/informed that you may be prosecuted for (set out the charge).
>
> Do you wish to say anything in answer to the charge? If there is any fact on which you intend to reply in your defence in court, you are advised to mention it now. If you hold it back till you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this will be done.'

Counsel for the appellant emphasized the requirement in s 122(6) that the notice in writing 'shall be explained to' the accused. First, he argued that it meant that both the charge and the warning must be explained. Next, he argued that the failure to explain either would in law render a statement purportedly recorded under s 122(6) inadmissible. In support of both arguments, he relied on the High Court decision in *PP* v *Chan Sway Beng*.[1]

In that case, after the accused was charged with murder, the investigating officer assisted by an inter-

preter proceeded to record a statement from the accused, following, as the investigating officer understood it, the procedure set out by the then s 121(6) [now s 122(6) of the CPC].

At the sub-trial, it was not disputed that the investigating officer read the charge and the warning to the accused word for word and that at no time did he explain the charge and the warning beyond reading both out. He did, however, ask the interpreter to explain both the charge and the warning to the accused which the interpreter did by interpreting word for word what the investigating officer read to the accused, and no more. At the conclusion of the sub-trial, the court declined to admit in evidence the statement made by the accused to the investigating officer. The reasons given by the court are to be found at p 412 of the report:

> In setting out to record a statement from the accused, [the investigating officer] had proceeded under s [122 (6)] of the Criminal Procedure Code. That subsection provides that a person who is invited to make a statement 'shall be served with a notice in writing' (the warning) 'which shall be explained to him ...' The warning incorporates the charge, and it follows that both must be explained.
>
> It was plain from the evidence before us that the charge was not explained to the accused; nor was the warning. Both were read out to him in English, and interpreted to him, word for word, in Cantonese. That is all. It is true that the accused signed statements written out on P52 to the effect that he understood both the charge and the warning, which statements were themselves interpreted to him, but we were not persuaded that this cured the omission to explain the charge and the warning.
>
> Section [122(6)] and s [123(1)] were enacted in 1976. The combined effect of these two subsections is that, where a person in the position in which the accused found himself fails, upon being administered the warning provided by s [122(6)], to mention a fact which he could reasonably have been expected to mention, the court may draw adverse inferences against him. Having removed the right, which previously existed, of an accused person to remain silent without adverse consequences, the *legislature was, by enacting ss [122(6)] and [123(1)], conferring upon the accused the right, if he wished, to make a statement in exculpation of himself at a certain stage of the proceedings against him, which the court was entitled to take a full account of.*
>
> *That, it seemed to us, could well be why s [122(6)] required that the warning be 'explained'.* ... (emphasis added).

The court then held:

> We declined to admit the accused's statement by reason of the failure of (the investigating officer) and (the interpreter) to explain the charge and the warning to the accused and for no other reason.

Section 122(6) itself does not provide for the admissibility of statements recorded thereunder. The admissibility of such statements must still be founded upon s 122(5) as one of the exceptions to s 122(1) which, prima facie, prohibits the use in evidence of any statement made by any person to a police officer in the course of a police investigation.

That s 122(5) governs the admissibility of statements made under s 122(6) is confirmed by s 122(7), which reads:

> No statement made by an accused person in answer to a written notice served on him pursuant to subsection (6) shall be construed as a statement caused by any inducement, threat or promise as is described in the proviso to subsection (5), if it is otherwise voluntary.

In our judgment, a statement whether or not it is purported to have been made under s 122(6) is admissible in evidence so long as s 122(5) is satisfied. There is no doubt that an inculpatory statement so admitted is evidence of the facts stated therein. It is not necessary for us to decide whether an *exculpatory* statement so admitted is evidence of the facts stated therein or, as the High Court put it another way in *Chan Sway Beng*'s case,[1] one 'which the court was entitled to take a full account of'. We understand that this issue has arisen in *PP* v *Chan Kim Choi*[2] where the High Court held that exculpatory statements when given in accordance with s 122(6) and tendered in court pursuant to s 122(5) may be admitted as part of the prosecution's evidence, but not as truth of the contents thereof. Since this issue has not arisen before us and since the decision of the High Court is under appeal, it is premature for us to comment on the decision.

However, apart from being admitted under s 122(5) of the CPC as an inculpatory statement or an exculpatory statement or as a mixed statement containing both inculpatory and exculpatory parts, a statement made under s 122(6) may be admitted under s 122(5) for another purpose, namely, the purpose stated in s 123(1) of the CPC. Section 123(1) provides:

> Where in any criminal proceedings against a person for an offence, evidence is given that the accused, on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any fact, *being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so charged or informed,* as the case may be, the court, in determining whether to commit the accused for trial or whether there is a case to answer, and the court, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure *as appear proper*; and the failure may, on the basis of those inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.
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> (Emphasis added.)

In such a case, the statement is admitted as evidence of the failure by the accused to mention a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so charged or informed and thereby enabling the court to draw such inferences as appear proper.

In our opinion, non-compliance with s 122(6) results not in a statement being inadmissible — since, as we have said, its admissibility depends on s 122(5) — but in enabling the court having to take such non-compliance

into consideration when deciding what inferences, if any at all, should be drawn from the failure of the accused to mention certain facts.

It may well be that the court considers the non-compliance of s 122(6) serious enough so that it will not draw any inferences at all from the failure of the accused to mention certain facts. On the other hand, the non-compliance may be trivial in nature, eg a non-material typographical error in the notice in writing, and the court will not in such a case be prevented from drawing such inferences as appear proper.

The test is whether it could be said that the circumstances existing at the time when the accused was charged with the offence or officially informed that he might be prosecuted for it, were such that he could not as a result of the non-compliance with s 122(6) be reasonably have been expected to mention certain facts on which he was relying in his defence in court. Or put another way, was the result of the non-compliance such that he was not made aware that his right to remain silent without suffering adverse consequences had been removed by s 122(6) and s 123(1)?

On the facts of the instant case, we observed that the trial judges were not invited to make inferences from the failure of the appellant to mention certain facts. In fact, the statement was not tendered as evidence of the failure of the appellant when charged to mention facts which he was relying on in his defence at the trial. His evidence at the trial was substantially the same as what he said in his s 122(6) statement. No new defence was raised at the trial which was inconsistent with the s 122(6) statement. If anything, the s 122(6) statement was a previous consistent statement of his evidence and of his defence, which, if admitted in evidence as it was, was favourable to the appellant's case, or at least did it no damage.

Clearly, then, once s 122(5) had been satisfied, the statement was admissible as a mixed statement containing inculpatory and exculpatory parts. We cannot see how, particularly in absence of any reliance by the prosecution on s 123(1), it could be argued by the appellant that non-compliance with s 122(6) should affect the admissibility of the statement.

It is sufficient for the purposes of disposing of the first ground for us to have decided that the trial judges were not wrong to admit the appellant's s 122(6) statement for the reasons we have stated without going on to decide whether on the facts the requirement in s 122(6) that the notice in writing 'shall be explained to [the appellant]' had or had not been complied with.

However, as the question is one of general importance, we proceed to make some observations on the requirement that the notice in writing 'shall be explained'. Section 122(6) is, save for the addition of the words 'which shall be explained to him', word-for-word taken from the recommendations of the Criminal Law Revision Committee in England which are contained in their Eleventh Report (Comnd 4991). While the addition of the words confers some measure of protection for an accused person whose right to silence has been affected, albeit not removed, by the enactment of ss 122(6) and 123(1) — and such protection is important especially if the accused person is uneducated or illiterate — it can, in our opinion, create some unnecessary problems.

First is the problem of what the mandatory explanation should consist of. Should the explanation of the charge and of the warning involve an explanation of the law relating to the offence which is the subject matter of the charge, as counsel for the appellant tried to argue before us? If so, are police officers competent to give such explanations? What is the effect if they err in their explanations? Can the police officers or interpreters remember what explanations they gave to the accused since such explanations are not recorded in writing? Can an accused waive the requirement that the charge and notice be explained? If he does not understand the explanations, is he under a duty to let the police officers know so that further explanations can be given or can he keep mum, sign a note that he has understood the charge and the notice and complain at the trial that they have not been explained or sufficiently explained to him? Can the charge be always explained to someone with low intelligence?

A second possible problem is that, unlike the notice in writing, the mandatory explanations do not seem to be exempted by s 122(7) from being any inducement, threat or promise as is described in the proviso to s 122(5). This will become important if the explanations are challenged as being inaccurate, or even outright wrong.

In our opinion these problems and other possible problems would not arise if the word 'explained' in s 122(6) were deleted and substituted by the word 'read'.

However, the fact remains that s 122(6) contains the requirement that the notice in writing 'shall be explained'. In our opinion, the requirement is satisfied if an accused person is told in general terms what the charge and warning mean. Since accused persons differ in background, what form the explanation should take must ultimately depend on the facts of each case.

On the facts of the instant case, we have no reason to disturb the finding by the trial judges that s 122(6) had been complied with. They dealt with the issue at p 11 of the grounds of decision as follows:

> In the present case, the forms of the charge and the warning both contained statements signed by Inspector Lee, the interpreter and the accused that the charge and the warning had been read and explained to the accused by the interpreter and that the accused had understood. Inspector Lee in his testimony said he instructed the interpreter to read and explain both the charge and the warning to the accused. He

admitted that he did not ask the interpreter to explain the charge of murder by reference to s 300 of the Penal Code or to explain any of the special exceptions to s 302 (sic) to the accused. The accused, in his testimony, said that he understood the charge to be one of murder under s 302 of the Penal Code. He did not say that the warning had not been explained to him or that he had not understood it. Having regard to the evidence, we were satisfied that the charge and the warning had been read and explained to him and/or at any rate that he understood both the charge and the warning.

We agreed and for the reasons stated above, this ground of appeal must fail.

The second ground

The second ground is that the trial judges had erred in law and in fact in finding that the stabbing of the deceased by the appellant was done with the intention of causing bodily injury to the deceased and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death.

Section 300(c) of the Penal Code (Cap 224, 1985 Ed), which was relied upon by the prosecution to make out the offence of murder in the trial below, reads:

300 Except in the cases hereinafter excepted culpable homicide is murder —

...

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;

...

Two local cases have considered the scope and meaning of the third limb of s 300 of the Penal Code.

In *Mimi Wong & Anor* v *PP*,[3] the Court of Criminal Appeal decided that a person cannot be found guilty of murder by the application of the third limb of s 300 unless it is proved that the fatal injury found to be present was the injury intended to be inflicted.

In *PP* v *Visuvanathan*,[4] the High Court decided that all the prosecution need prove, for the application of the third limb of s 300, is

(1) that the accused did an act which caused the death of the deceased;
(2) that the said act was done with the intention of causing bodily injury;
(3) that the injury caused —
    (a) was intended and was not accidental or otherwise unintentional; and
    (b) was sufficient in the ordinary course of nature to cause death.

The decision was affirmed on appeal by the Court of Criminal Appeal in Criminal Appeal No 22 of 1976.

Therefore, in so far as the law is concerned, that is settled. The trial judges below applied the test laid down in *PP* v *Visuvanathan*.[4]

The only question before us is whether the trial judges were wrong in finding on the evidence before them that the case came within the third limb of s 300 of the Penal Code.

On the facts of the instant case, it was not disputed that the appellant did an act which caused the death of the deceased: the appellant stabbed the deceased with a fruit knife and this caused the death of the deceased.

It was not disputed that the injury caused was sufficient in the ordinary course of nature to cause death. The deceased had died from massive bleeding due to a single stab wound at the right side of the anterior abdominal wall region. The wound measured 6.5cm x 2.8cm when lax but 7cm with the margins of the wound approximated together. The wound was 10 to 12 cm deep. It had cut through a part of the large intestine, the small intestine, and the root of the mesentery, which is the layer of fatty tissue that connects the small intestine to the back of the abdomen from whence it gets its blood supply. The knife also penetrated the aorta running along the spinal column, entering it and exiting on the other side and terminating in the muscle lying next to the spinal column. Doctor Clarence Tan, the forensic pathologist who gave evidence of the injuries at the trial, was of the opinion that it was virtually impossible to save a person who had suffered this kind of injury.

In other words, elements 1 and 3(b) of the *Visuvanathan*[4] test were not disputed.

The only arguments raised before us were that the act of stabbing was not a voluntary (ie deliberate) act as it had occurred during a struggle and the appellant did not intend to inflict the injury in question.

In other words, elements 2 and 3(a) of the *Visuvanathan*[4] test were disputed.

Counsel for the appellant submitted that the trial judges had erred in finding that (a) the stabbing was a calculated and deliberate act; (b) the appellant had intended to stab the deceased in a vulnerable part of the body; and (c) the deceased was taken by surprise and unable to shout for help.

The evidence, he submitted, showed that there was a probability that the injury could have been caused during a struggle. These are questions of fact. An appellate court will not disturb findings of fact unless they are clearly reached against the weight of the evidence. The trial judges below dealt with the issue as follows:

In his closing address, counsel for the accused submitted that the defence had created a reasonable doubt as to whether the

accused had intended to kill the deceased or to cause him such bodily injury as was sufficient in the ordinary course of nature to cause death. It was contended that the act of stabbing the deceased in the stomach was not a voluntary (ie a deliberate) act as it had occurred during a struggle. Also, the accused had not intended to puncture the aorta, and if the aorta had not been punctured, the deceased would not have died. It was also contended that the accused had only stabbed the deceased once and that if he had intended to kill him, he would have inflicted more injuries.

We could not accept this submission. The accused had, in his own words, wanted to teach the deceased a lesson by stabbing him with a knife. He went to his cabin and brought the knife to the pantry in order to stab the deceased. The knife had a 6 inch blade. Where he had intended to stab the deceased, the accused did not say but still he intended to stab the deceased. As regards the accused's testimony that the stabbing occurred during the struggle, we were prepared to accept his evidence that there was some sort of struggle in the sense that the deceased had struggled with the accused for possession of the knife or to prevent the accused from stabbing the deceased. In our view, the deceased was taken by surprise and was unable to shout for help. Otherwise Yong, who was outside the pantry in the passage way would have heard something. In our view, the struggle did not make the stabbing accident (sic). The struggle occurred because the deceased was trying to prevent the accused from stabbing him. He failed to do so because he was weaker than the accused and he paid for it with his life. In our view, the stabbing was a calculated and deliberate act. Although only moderate force was required to cause the injuries that were actually caused to the deceased, the accused had intended to stab the deceased in a vulnerable part of the body. The accused admitted that he was thrusting the knife forward at the deceased at waist level. The stabbing was done with the intention of causing bodily injury to the deceased and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. In this respect, we applied the test laid down by a panel of this court, which test was approved by the Court of Criminal Appeal in *PP* v *Visuvanathan* [1978] 1 MLJ 159 at p 161.

We see no reason to disturb the findings of the trial judges. In the result, the second ground must also fail. For all the above reasons, we unanimously dismissed the appeal.

Appeal dismissed.

Solicitors: *Michael SE Teo.*

Reported by *Mathavan Devadas*

Procam (Pte) Ltd v Nangle & Anor

HIGH COURT (SINGAPORE) — COMPANIES WINDING-UP NO 617 OF 1985
THEAN J
10 JULY 1990

Companies and Corporations — Liquidators, removal of — Liquidators appointed solicitors — Solicitors had acted for petitioning creditor — Solicitors were also acting for a secured creditor — Whether conflict of interests arose — Whether liquidators should be removed — Companies Act (Cap 50, 1985 Ed), s 268

The applicant is a creditor of PPKD, the company, which was subject to a winding-up order on 11 April 1986. The respondents were appointed liquidators. On 31 October 1985, prior to the winding-up order, the company had obtained an injunction against the petitioning creditor restraining winding-up proceedings. When the injunction was discharged, the solicitors for the petitioning creditor, D&N, drew up a bill of costs for taxation with the company. The taxation was adjourned when the winding-up order was made. The liquidators then applied for the solicitors to be appointed their solicitors. But D&N were also at that time solicitors for BP, another secured creditor of the company.

The applicant's main complaint was that the liquidators had acted irresponsibly by engaging D&N as solicitors in the winding-up when the latter was also acting for the petitioning creditors and BP, another creditor, and that the interests of the two creditors conflict with that of the company in the winding-up.

The other complaints were that the liquidators did not act impartially in engaging D&N to prosecute multiple claims against various companies, that there were erroneous payments of full costs to D&N, that actions were taken by the liquidators to get in and collect book debts and properties which belong to a secured creditor, that they had taken winding-up proceedings against debtor companies for debts that were in dispute, that there was lack of care in presenting petitions to wind up companies and that they allowed themselves to be in a position of conflict of interests by being appointed liquidators of two other companies, BDPL and RCPL.

Held, dismissing the application:

(1) The taxation of the bill of costs was still a matter in dispute between the petitioning creditors and the company at the time of winding-up. Clearly, D&N could not act for the liquidators who at that time needed proper legal advice on the bill of costs, and they had not received any.

(2) The liquidators knew of the securities that had been created in favour of BP by the company. In respect of such securities, the liquidators' interests and BP's interests as secured creditor were not and could not be identical as BP were mortgagees or chargees under the securities and it would have to get in and protect their securities and where necessary, to enforce and realize their securities. The liquidators, who would have to examine whether the securities were valid, should have sought independent legal advice and assistance from a solicitor and they could not and should not instruct the same firm of solicitors who were acting for BP. Right from the commencement of liquidation, the conflict had already arisen and the liquidators should have discerned and realized it. However, although they had made a mistake, the mistake was made in good faith.

(3) There was no evidence that the multiple claims by the liquidators against various companies were ill-founded, baseless or utterly unjustified nor that they were not acting impartially.